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No. 10-151

In the Supreme Court of the United States

LARRY DEPEE, a California Highway Patrol Officer, and the STATE OF CALIFORNIA,

Petitioners,

v.

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of John Joseph Wayne Watkins,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court did not abuse its discretion in awarding attorney's fees under 42 U.S.C. § 1988 to respondent's counsel, in a case where respondent established that petitioner police officer violated the Constitution by using deadly force against respondent's son but was awarded only nominal damages.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
STATEMENT 1
REASONS FOR DENYING THE PETITION 8
I. THE DECISION BELOW IS CONSISTENT WITH *FARRAR*. 9
A. The *Farrar* Factors. 9
B. The Court Of Appeals Correctly Applied *Farrar* In This Case 11
1. The First *Farrar* Factor: Difference Between Amount Sought And Damages Awarded. 12
2. The Second *Farrar* Factor: Legal Significance. 13
3. The Third *Farrar* Factor: Public Importance 14
4. Balancing The *Farrar* Factors. 16
C. Petitioners' Theory Is Inconsistent With *Farrar* 17
II. THE CIRCUITS APPLY THE *FARRAR* STANDARD TO ASSESS DISTRICT COURT AWARDS OF ATTORNEY'S FEES UNIFORMLY AND CONSISTENTLY. 18
A. There Is No Circuit Split Over The Exceptionality Of Fee Awards In Nominal Damages Cases 20

TABLE OF CONTENTS—continued

Page

B. There Is No Circuit Split Over The Meaning Or Application Of The Second *Farrar* Factor—The "Significance Of The Legal Issue." 21

1. Meaning Of "Significance Of The Legal Issue." 21

2. Application Of "Significance Of The Legal Issue." 23

C. There Is No Circuit Split On The Application Of The Third *Farrar* Factor—Whether The Litigation Served A "Public Goal." 25

D. The Abuse Of Discretion Standard Of Review On Appeal Explains The "Inconsistent" Results Alleged By Petitioners. 27

III. THIS CASE IS A POOR VEHICLE WITH WHICH TO CONSIDER THE QUESTION PRESENTED. 30

CONCLUSION 31

APPENDIX

A. Transcript of Proceedings, *Mahach-Watkins* v. *Depee*, No. C 05-01143-SI (N.D. Cal. Aug. 9, 2007) 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Barber v. *T. D. Williamson, Inc.*,
254 F.3d 1223 (10th Cir. 2001) 22

Barrington v. *Ermine*,
534 U.S. 994 (2001) 31

Belot v. *Burge*,
490 F.3d 201 (2d Cir. 2007) 29

Boston's Children First v. *City of Boston*,
395 F.3d 10 (1st Cir. 2005) 23, 24

Briggs v. *Marshall*,
93 F.3d 355 (7th Cir. 1996).....27, 28

Cabrera v. *Jakabovitz*,
24 F.3d 372 (2d Cir. 1994) 19, 21, 24

City of Los Angeles v. *Lyons*,
461 U.S. 95 (1983)..... 17

David v. *District of Columbia*,
674 F. Supp. 2d 34 (D.D.C. 2009).....19, 21

Diaz-Rivera v. *Rivera-Rodriguez*,
377 F.3d 119 (1st Cir. 2004) 19, 20, 21, 25

Farrar v. *Hobby*,
506 U.S. 103 (1992).....*passim*

Gay Officers Action League v. *Puerto Rico*,
247 F.3d 288 (1st Cir. 2001) 30

Gray ex rel. *Alexander* v. *Bostic*,
570 F.3d 1321 (11th Cir. 2009)..... 25

Gray ex rel. *Alexander* v. *Bostic*,
613 F.3d 1035 (11th Cir. 2010).....19, 20, 21, 25

TABLE OF AUTHORITIES—continued

Page(s)

Guy v. *City of San Diego*,
608 F.3d 582 (9th Cir. 2010) 26

Hensley v. *Eckerhart*,
461 U.S. 424 (1983) 16

Hidden Oaks Ltd. v. *City of Austin*,
138 F.3d 1036 (5th Cir. 1998) 19

Jama v. *Esmor Correctional Services, Inc.*,
577 F.3d 169 (3d Cir. 2009) 19, 21

Jones v. *Lockhart*,
29 F.3d 422 (8th Cir. 1994) 25

Kansas v. *Brandau*,
526 U.S. 1133 (1999) 31

Koopman v. *Water District No. 1 of Johnson County*, 41 F.3d 1417 (10th Cir. 1994) 19, 26

Ledford v. *Peeples*,
605 F.3d 871 (11th Cir. 2010) 29

Maul v. *Constan*,
23 F.3d 143 (7th Cir. 1994) .....*passim*

Memphis Community School District v. *Stachura*, 477 U.S. 299 (1986) 4

Mercer v. *Duke University*,
401 F.3d 199 (4th Cir. 2005) 19, 21, 25

Milton v. *City of Des Moines*,
47 F.3d 944 (8th Cir. 1995) 21, 27, 28

Milton v. *Heller*,
516 U.S. 824 (1995) 31

TABLE OF AUTHORITIES—continued

Page(s)

Muhammad v. *Lockhart*,
104 F.3d 1069 (8th Cir. 1997) 19, 26

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) 29

O'Connor v. *Huard*,
117 F.3d 12 (1st Cir. 1997) 26

Owen v. *City of Independence*,
445 U.S. 622 (1980) 15

Perdue v. *Kenny A.*,
130 S. Ct. 1662 (2010) 16

Peters v. *Polk County Memorial Hospital*,
513 U.S. 807 (1994) 31

Pierce v. *Underwood*,
487 U.S. 552 (1988) 16

Pino v. *Locascio*,
101 F.3d 235 (2d Cir. 1996) 20, 21, 24, 26

Piper v. *Oliver*,
69 F.3d 875 (8th Cir. 1995) 25, 26

Pouillon v. *Little*,
326 F.3d 713 (6th Cir. 2003) 19, 24

Romberg v. *Nichols*,
516 U.S. 943 (1995) 31

Roper v. *Simmons*,
543 U.S. 551 (2005) 14

United States v. *Fonseca*,
435 F.3d 369 (D.C. Cir. 2006) 29, 30

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Irey*,
612 F.3d 1160 (11th Cir. 2010) 29

Water District No. 1 of Johnson County v. *Koopman*, 516 U.S. 965 (1995) 31

Yourdon, Inc. v. *Bridges*,
520 U.S. 1274 (1997) 31

STATUTES

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

Cal. Code Civ. Proc. § 377.34 4

Cal. Code Civ. Proc. § 425.10(b) 3

OTHER AUTHORITIES

Jesse McKinley, *In California, Protests After Man Dies at Hands of Transit Police*, N.Y. Times, Jan. 8, 2009 15

S. Rep. 94-1011 (1976) 18

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

In *Farrar* v. *Hobby*, 506 U.S. 103 (1992), this Court held that a plaintiff who wins nominal damages is a prevailing party under 42 U.S.C. § 1988, and that such a plaintiff may be eligible for an award of attorney's fees under that statute. 506 U.S. at 112, 115. Respondent is a prevailing party under Section 1988: In 2007, a jury found that petitioner Depee violated the Constitution when he shot and killed respondent's son, although it awarded only nominal damages of one dollar on her 42 U.S.C. § 1983 claim. The district court awarded attorney's fees to respondent, and the court of appeals affirmed that award.

In their petition for certiorari, petitioners fail to demonstrate that any other court of appeals would have reached a different result: They do not show that any other circuit would have reversed, under an abuse-of-discretion standard, a trial court's award of attorney's fees in this unusual case—in which a police officer's excessive force resulted in *death*; in which respondent never specified the dollar amount of compensatory damages she sought for the Section 1983 claim on which she prevailed; and in which the trial court made a novel ruling of law that compensatory damages were unavailable on that claim.

Instead, petitioners simply highlight the unremarkable reality that sometimes courts award attorney's fees in nominal damages cases, and sometimes they do not. That is precisely the result one would expect to follow from *Farrar*. This case accordingly does not merit review by this Court.

1. On December 9, 2003, petitioner Larry Depee, a California Highway Patrol (CHP) officer, observed John Watkins, son of respondent Sylvia Mahach-Watkins, riding his bicycle against traffic on U.S. Highway 101. Petitioner stopped his patrol car in front of Watkins, who ran to a wooded area. Petitioner chased Watkins and a struggle ensued, which ended with Depee drawing his gun and shooting Watkins several times, killing him.

Both courts below recounted respondent's account of what occurred during the shooting, which was based in part on the declaration of a forensic pathologist:

> "[P]laintiff maintains that at the time Depee shot Watkins, Watkins was lying on his left side with his right arm raised up in a 'warding off' gesture, and that Watkins could not have been swinging [Depee's] flashlight at the time of his death [as Depee asserted]. Plaintiff also emphasizes the fact that a fingerprint analysis of Depee's flashlight only revealed one of Watkins' fingerprints on the head area of the flashlight; plaintiff asserts that if Depee's version of events was true, there would be more of Watkins' fingerprints on the flashlight, and that those fingerprints would be on the shaft of the flashlight."

Pet. App. 4 (citation omitted). The court of appeals noted that "[t]he evidence at trial was largely consistent with this narrative" (Pet. App. 4) and that, although the CHP maintained that Depee's actions were appropriate, "we are bound to conclude otherwise, given the unappealed jury verdict that Depee used unconstitutionally excessive force in killing Watkins." Pet. App. 18.

2. After Watkins' death, respondent filed suit in state court under 42 U.S.C. § 1983 and various provisions of California law. State court rules prohibited respondent from seeking a specific dollar amount in damages for her state wrongful death claim, and she did not request a specific amount either for that claim or for her Section 1983 claims.[1] Pet. App. 12. After petitioners removed the case to federal court, respondent filed an amended complaint there. Again, respondent did not specify an amount of damages with respect to any of her claims, including her Section 1983 claims. See First Amended Complaint at 21-22, *Mahach-Watkins* v. *Depee*, No. C-05-1143-SI (N.D. Cal. May 1, 2005).[2]

Three claims proceeded to trial: a Section 1983 Fourteenth Amendment claim by respondent, a Section 1983 Fourth Amendment claim by Watkins' estate, and a state-law wrongful death claim by respondent. The district court held a three-week jury trial, divided into liability and damages phases. Pet. App. 6. At the conclusion of the liability phase of the

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[1] Section 425.10(b) of the California Civil Code provides that "where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated * * *." Cal. Code Civ. Proc. § 425.10(b).

[2] Respondent did attach to her first amended complaint a government claim for $10 million in compensation. See First Amended Complaint at 3 (incorporating by reference the government claim as Appendix B). But this was a claim for compensation of respondent Mahach-Watkins in her individual capacity as Watkins' mother (and of Watkins' sister) for their loss of Watkins' companionship and future income stream. See *ibid.* This government claim is distinct from the estate's Section 1983 claim at issue here, which is the federal claim for which the district court awarded attorney's fees.

trial, the jury returned a verdict against petitioners on the estate's Section 1983 Fourth Amendment excessive force claim and on respondent's state-law wrongful death claim. Pet. App. 6.

3. For a violation of Fourth Amendment rights, a plaintiff normally may seek compensatory damages for such things as medical expenses, loss of earnings, mental anguish, and pain and suffering, as well as punitive damages for wanton and willful conduct. *Memphis Community Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-307 (1986). Here, however, the district court ruled that Watkins' estate could not recover compensatory damages on the Section 1983 claim *as a matter of law* because this was a special case involving excessive force resulting in *death*. The district court noted the absence of circuit precedent on the question of what damages are available for a Section 1983 excessive force claim involving death. It concluded that the available damages are those set forth in California's survival statute, Cal. Code Civ. Proc. § 377.34, which does not allow recovery for the decedent's loss of enjoyment of life or pain and suffering. Pet. App. 13.[3]

Consistent with the district court's ruling, in closing argument respondent's counsel informed the jury that compensatory damages were unavailable on the Section 1983 claim, and that only nominal damages (plus punitive damages) were available. See Resp. App., *infra*, 2a. Respondent never asked for a specific dollar amount in compensatory damages on

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[3] There were no out-of-pocket or medical expenses here because Watkins died prior to receiving medical attention.

the Section 1983 claim.[4] The district court instructed the jury that it could return a compensatory award of no more than one dollar in nominal damages on that claim, irrespective of what the evidence showed. The jury did award one dollar in nominal damages on that claim. Pet. App. 6.

4. Compensatory damages on a state wrongful death claim may be awarded for the plaintiff's loss of the companionship of the decedent and loss of the decedent's future earnings. But Watkins' psychiatric disabilities had rendered him unemployable, he had no dependent wife or children, and he had a troubled relationship with his mother. Pet. App. 3, 7. Thus, compensatory damages were effectively unavailable to respondent with respect to the state wrongful

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[4] Petitioners misleadingly state that respondent's counsel "argued to the jury for compensatory damages of $10 million * * *." Pet. 7. With respect to the Section 1983 claim, however, respondent *never* asked for a specific dollar amount in damages. Respondent's counsel mentioned $10 million *only* in the context of discussing compensatory damages for the *state wrongful death claim*: She compared the loss of an art masterpiece worth $10 to $20 million to respondent's loss of her son. Resp. App., *infra*, 5a. Immediately thereafter, when encouraging the jury to award at least $10 million in compensatory damages on the state-law claim, respondent's counsel referred to the state wrongful death claim as "Claim 1" (Claim 1 actually was the Section 1983 claim). Resp. App., *infra*, 5a. But the context and proximity of this statement to the art masterpiece analogy would have made it clear to the jury that counsel was referring to the state wrongful death claim, not the Section 1983 claim, in suggesting that $10 million was an appropriate compensatory damages award. Indeed, earlier in her argument, respondent's counsel had stated expressly that compensatory damages were unavailable on the Section 1983 claim and that the jury could award no more than nominal damages on that claim. See Resp. App., *infra*, 2a.

death claim on which she prevailed, notwithstanding the jury's finding "that Depee acted improperly in killing her son." Pet. App. 19. The jury awarded one dollar in nominal damages on that claim as well. Pet. App. 6.

5. As the prevailing party in a Section 1983 suit, respondent sought attorney's fees under 42 U.S.C. § 1988. She requested $686,796.74 and was awarded $136,687.35. Petitioners appealed the award of attorney's fees, and respondent cross-appealed the amount of the award. Pet. App. 7.

The court of appeals affirmed the award of attorney's fees, rejecting both appeals. The court first noted the highly deferential abuse-of-discretion standard used to review a district court's award of attorney's fees. Pet. App. 8. The court then proceeded through the three factors bearing on the award of fees discussed by Justice O'Connor in her concurring opinion in *Farrar*.

The court first considered the "difference between the amount recovered and the damages sought." Pet. App. 11 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)). It noted that here, unlike in *Farrar*, respondent did not seek a specified amount of damages. Rather, she asked for an award of compensatory damages "according to proof at trial." Pet. App. 12.[5]

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[5] As we have noted (at notes 2, 4, *supra*), the government claim for $10 million that respondent attached to her first amended complaint is unrelated to the Section 1983 claim at issue here. Thus, the court of appeals properly did not consider it in determining the amount of damages sought by respondent with respect to the Section 1983 claim for which the district court awarded attorney's fees. Petitioners accordingly are incorrect in

The court of appeals also took into consideration that compensatory damages were not available as a matter of law due to the district court's novel application of state-law damages limitations to a Section 1983 claim, a feature of the case that distinguished it from *Farrar*. In *Farrar*, the plaintiff recovered only nominal damages "because of his failure to prove an essential element of his claim for monetary relief"; here, respondent recovered only nominal damages because, as a matter of law, compensatory damages were unavailable. Pet. App. 13-14 (quoting *Farrar*, 506 U.S. at 115). The court of appeals nevertheless opined that the award of nominal damages "somewhat disfavors an award of attorney's fees." Pet. App. 15.

The court turned next to the second *Farrar* factor: the "significance of the legal issue" on which respondent prevailed. Pet. App. 15 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)). On this, after "assess[ing the importance of the issue presented] by comparing it to other issues that our sister circuits have held to qualify as important under this factor," the court had "difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death." Pet. App. 16.

Finally, the court of appeals considered whether respondent's litigation accomplished a "public goal." Pet. App. 17 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)). The court noted that a change in police policy resulting from a lawsuit is a sufficient but not a necessary condition for determining that a lawsuit served such a goal. Here, the court found that respondent's victory achieved tangible re-

contending that the court of appeals "overlooked" the request for $10 million in damages. Pet. 7, 13.

sults in addition to the vindication of her son's constitutional rights: It will likely deter petitioner Depee from engaging in future unconstitutional conduct and will discourage such conduct by "others who establish and implement official policies governing arrests of citizens." Pet. App. 18-19 (quoting *Morales* v. *City of San Rafael*, 96 F.3d 359, 364-365 (9th Cir. 1996)). The court therefore concluded that the third *Farrar* factor counseled in favor of a fee award. Taking all of the factors into account, the court of appeals accordingly affirmed the district court's award of fees, concluding that "[t]he jury did not give [respondent] everything she asked for, but it gave her enough to entitle her to an award of attorney's fees under § 1988." Pet. App. 19.

6. The court of appeals denied panel rehearing and rehearing en banc without dissent. Pet. App. 32-33.

REASONS FOR DENYING THE PETITION

Petitioners' central contention is that this case cannot be distinguished from *Farrar*. But that plainly is not so. *Farrar* involved a plaintiff who established only that his rights had been violated "in some unspecified way." 506 U.S. at 114. Such a verdict, which even the *Farrar* plaintiff "acknowledge[d] [wa]s 'regrettably obtuse,'" "carries no discernable meaning" and "d[oes] not identify the kind of lawless conduct that might be prevented." *Id.* at 122 (O'Connor, J., concurring). Thus, "[i]f ever there was a plaintiff who deserved no attorney's fees at all, that plaintiff [wa]s Joseph Farrar." *Id.* at 117.

The contrast with this case could not be sharper: respondent is a mother whose son, the jury found, was wrongly killed by petitioner Depee's use of ex-

cessive force. It should be needless to say that this is hardly a case where the injury was unclear, the meaning of the verdict obscure, or the prospect of deterring future unconstitutional conduct speculative.

Nor are petitioners on stronger ground in contending that the circuits apply inconsistent standards in determining entitlement to fees under Section 1988. Petitioners have not identified *any* decision from *any* circuit in which a plaintiff who established a violation of constitutional rights resulting in death was not awarded attorney's fees. To the extent that certain of the decisions cited by petitioners nevertheless have upheld fee awards while others have upheld decisions denying fees, that is the natural product of the varying factual situations presented to the courts of appeals and of the abuse-of-discretion standard applied to the review of fee decisions. There is nothing surprising or novel in this: "Civil rights cases often are complex, and [the Court] therefore ha[s] committed the task of calculating attorney's fees to the trial court's discretion for good reason." *Id.* at 123 (White, J., concurring in part and dissenting in part). That explains the outcome here. This case accordingly does not warrant further review.

I. THE DECISION BELOW IS CONSISTENT WITH *FARRAR*.

A. The *Farrar* Factors.

The courts below, like petitioners here, started with the proposition that the principle governing in this case was set out by the Court in *Farrar*, which addressed the entitlement to attorney's fees of a Section 1983 plaintiff who sought recovery of $17 million but was awarded only nominal damages. Although concluding that the plaintiff in *that* case should not

be awarded fees—because the "litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] their rights had been violated' in some unspecified way," and because the district court awarded fees "without engaging in any measured exercise of discretion" (*id.* at 114 (majority opinion) (citation omitted))—every member of the Court agreed that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id.* at 112. See *id.* at 116 (O'Connor, J., concurring) ("Joseph Farrar met that minimum condition for prevailing party status."); *id.* at 123 (White, J., concurring in part and dissenting in part) ("Because Farrar won an enforceable judgment against respondent, he has achieved a 'material alteration' of their legal relationship, and thus he is a 'prevailing party' under the statute.") (citation omitted). Every Justice likewise was in agreement that a prevailing party who is awarded only nominal damages is *eligible* for a fee award. See *id.* at 115 (majority opinion) ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is *usually* no fee at all." (citation omitted and emphasis added); *id.* at 120-122 (O'Connor, J., concurring) (articulating factors for determining a fee award); *id.* at 122-123 (White, J., concurring in part and dissenting in part) ("[C]learly, the majority does not" hold that "recovery of nominal damages *never* can support the award of attorney's fees.").

Accordingly, the Court examined in detail Farrar's nominal damages victory. The *Farrar* majority stated that a court "is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.* at 114 (majority

opinion) (quoting *Riverside* v. *Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in the judgment)). And Justice O'Connor, who supplied the fifth vote for the majority, reasoned that "the courts also must look to other factors." *Id.* at 121 (O'Connor, J., concurring). She identified one such factor as the "significance of the legal issue on which the plaintiff claims to have prevailed." *Ibid.* Another is whether the litigation "accomplished some public goal * * *." *Ibid.*

Against this background, three factors bearing on the availability of fees emerge from the Court's decision in *Farrar* and Justice O'Connor's concurrence in that case: (1) the difference between the amount sought and the amount awarded; (2) the legal significance of the issue; and (3) the public importance of the litigation. As discussed below, the courts of appeals—including the Ninth Circuit in this case—have uniformly and consistently applied this standard to determine the reasonableness of a fee award.

B. The Court Of Appeals Correctly Applied *Farrar* In This Case.

In this case, the court below carefully considered the *Farrar* factors in determining that the district court did not abuse its discretion in awarding attorney's fees. See Pet. App. 11 (listing the three *Farrar* factors). That decision surely was correct. This Court held fees presumptively unavailable in *Farrar* both because the plaintiff's failure to obtain a substantial recovery followed from his inability to prove that the defendant caused plaintiff's injury and because the verdict for the plaintiff carried no discernible meaning. This case is different in every particular: respondent proved that petitioner Depee violated the

Constitution by using excessive force, a wrong that directly caused the death of respondent's son and for which substantial damages were held unavailable only because of a quirk in state wrongful death law. This would seem the very definition of a case in which the plaintiff acted reasonably in pursuing litigation and for which fees should be awarded.

1. The First Farrar *Factor: Difference Between Amount Sought And Damages Awarded.*

The court of appeals began its inquiry with an examination of the "difference between the amount of damages sought and recovered." Pet. App. 12.

Respondent did not specify an amount of damages in her first amended complaint. Regarding her Section 1983 claim, respondent sought "only general and punitive damages 'in an amount to be determined according to proof at trial.'" Pet. App. 12 (quoting First Amended Complaint at 22). At no point in the proceedings did respondent request a specific monetary award of damages for this claim. And, most significantly, respondent was denied compensatory damages only because the district court held, in a decision of first impression, that California state law governs in Section 1983 wrongful death actions and precludes "recovery for the decedent's loss of enjoyment of life, or the decedent's pain and suffering." Pet. App. 12, 13 (quoting Order Denying Plaintiff's Motion for Partial New Trial on Damages, *Mahach-Watkins*, No. C-05-1143-SI, 2007 WL 3238691 (N.D. Cal. Oct. 31, 2007)).

On this, comparison to *Farrar* is instructive. The *Farrar* plaintiff sought $17 million and was awarded $1. See 506 U.S. at 106-107. The nominal damages

award resulted from the *Farrar* plaintiff's failure to prove proximate cause, an essential element of his claim. See *id.* at 115. Respondent here, in contrast, did not fail to obtain a specific requested amount and, in particular, did not fail to obtain the amount sought because of an inability to establish an element of her claim. And respondent did prove, of course, that petitioner Depee's unconstitutional conduct resulted in the death of her son.

Even so, the court below concluded that the first *Farrar* "factor somewhat disfavors an award of attorney's fees." Pet. App. 15. There is reason to doubt that is correct: nothing in *Farrar* militates against the award of fees where, as here, the plaintiff proved her case and obtained all the compensatory damages to which the law entitled her. But at a minimum, where the plaintiff did not request a specific monetary amount—and where an idiosyncratic legal ruling precluded monetary recovery for real and significant injury—the salience of the first *Farrar* consideration is much reduced. Indeed, when a plaintiff does not request a specific monetary award, the "difference between the amount of damages *sought* and recovered" (the linchpin of the *Farrar* holding) is not subject to calculation at all. Pet. App. 12 (emphasis added). This element of the *Farrar* analysis therefore offers petitioners no support.

2. The Second Farrar *Factor: Legal Significance.*

Following Justice O'Connor's *Farrar* concurrence, the court below next examined "the significance of the legal issue on which the plaintiff claims to have prevailed." Pet. App. 15 (quoting *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring)).

In this case, respondent's central submission was that the "state-sanctioned force resulting in death was excessive." Pet. App. 16. Respondent prevailed on this claim. And as the court of appeals expressly recognized, it is "difficult[] [to] imagin[e] a more important issue than the legality of state-sanctioned force resulting in death." Pet. App. 16.

This conclusion would seem to be beyond serious dispute. The nature of the rules that govern the state's use of deadly force "is obviously of supreme importance to anyone who might be subject to such force. But it is also of great importance to a law enforcement officer who is placed in a situation where deadly force may be appropriate." Pet. App. 16. Indeed, limits on the state's exercise of deadly force are central to our nation's democracy and constitutional commitments. *Cf. Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."). Given the obvious significance of the issue presented in this type of suit, the court below properly "conclude[d] that the second factor supports the award of attorney's fees." Pet. App. 16.

3. The Third Farrar *Factor: Public Importance.*

In assessing entitlement to fees, courts also look to whether the litigation "accomplished some public goal other than occupying the time and energy of counsel, court, and client." *Farrar*, 506 U.S. at 121-122 (O'Connor, J., concurring).

In her concurring opinion in *Farrar*, Justice O'Connor recognized that "deter[ring] future lawless conduct" (*id.* at 122) serves such an important public

function. See *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."). Here, the court below concluded that even though the CHP did not sanction Officer Depee, there was an important public statement in the jury's finding that excessive force was used. Pet. App. 17-19. The verdict thus had the deterrent effect of "'helping to protect * * * persons like [Watkins] from being subjected to similar unlawful treatment in the future.'" Pet. App. 19 (quoting *Morales*, 96 F.3d at 364-365).

The importance of a wrongful death suit often extends beyond the case at hand. Excessive force cases frequently attract public scrutiny and outcry. See, *e.g.*, Jesse McKinley, *In California, Protests After Man Dies at Hands of Transit Police*, N.Y. Times, Jan. 8, 2009, http://www.nytimes.com/2009/01/09/us/09oakland.html. And contrary to petitioners' claim that there needs to be "proof in the record" that a "mere nominal damages judgment will alter a defendant's behavior" (Pet. 23), the common sense of the matter suggests that a finding of unconstitutional conduct resulting in death will affect future conduct, by both Depee and other state employees. That is so, the court below explained, because, even though the CHP continued to assert that Depee acted appropriately, "we are bound to conclude otherwise, given the unappealed jury verdict * * *." Pet. App. 18. Given these concerns, the court below correctly "conclude[d] that the third factor favors the award of attorney's fees." Pet. App. 19.

4. Balancing The Farrar *Factors.*

Against this background, the totality of relevant considerations favors the award of fees. As both courts below recognized, the "jury's liability verdict on the Section 1983 claim was hardly a hollow victory for a mother suing for the death of her son." Pet. App. 19. Nothing in that determination warrants this Court's review. To the contrary, "[i]n awarding attorney's fees in this case, the district court wrote a careful order emphasizing the second and third [*Farrar*] factors." Pet. App. 11. Determining whether there is room for disagreement over this balance struck by the district court "is not a matter of general importance on which [this Court's] guidance is needed." *Farrar*, 506 U.S. at 124 (White, J., concurring in part and dissenting in part). Rather, this fact-intensive inquiry is best left, in the first instance, to the expertise of the lower courts. See, *e.g.*, *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988) ("It is especially common for issues involving what can broadly be labeled 'supervision of litigation,' * * * to be given abuse-of-discretion review."); *Hensley* v. *Eckerhart*, 461 U.S. 424, 436-437 (1983); *Perdue* v. *Kenny A.*, 130 S. Ct. 1662, 1679 (2010) (Breyer, J., concurring in part and dissenting in part) ("[D]etermining whether a fee enhancement is warranted in a given case is a matter that is committed to the sound discretion of a trial judge, and the function of appellate courts is to review that judge's determination for an abuse of such discretion.") (internal citation and quotation marks omitted). This Court accordingly should leave the rulings below undisturbed.

C. Petitioners' Theory Is Inconsistent With *Farrar*.

Petitioners' contrary view has no basis in the text or policy of Section 1988. The statute "ensures the vindication of important rights, even when large sums of money are not at stake * * *." *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring). But petitioners seek to restrict Section 1988 by granting attorney's fees to nominal damages winners only when the litigation has accomplished some institutional purpose "such as invalidating an unconstitutional policy of the defendant or securing injunctive, declaratory, or class relief." Pet. 26.

That, however, is not what *Farrar* holds or Section 1988 says. Put simply, *Farrar* instructs that prevailing parties must be eligible for attorney's fees under Section 1988. At no point does *Farrar* suggest that plaintiffs who have recovered only nominal damages are *categorically* barred from receiving attorney's fees. Yet if this Court were to adopt petitioners' proposed rule, an entire class of prevailing parties would be excluded from Section 1988's ambit; adding an unconstitutional policy, or a declaratory, injunctive, or class-wide relief requirement, would take away lower-court discretion. Given that district courts oversee civil rights cases from start to finish, petitioners' theory would restrict a trial judge's necessary ability to differentiate one case from another and to award fees to deserving litigants.

Such an outcome would be particularly inappropriate because some civil rights plaintiffs lack Article III standing to seek injunctive or declaratory relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983). In the wrongful death suit here, for example, respondent could bring a cause of action under Section 1983

for damages but not for injunctive relief, as she could not demonstrate a likelihood that defendants would repeat their wrongful conduct against her or her son in the future. Petitioners' proposed rule would thus force such plaintiffs to bear their own costs. But limiting attorney's fees in such a fashion would run counter to Congress's view that "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these [civil rights] laws contain." S. Rep. 94-1011, at 2 (1976). This Court's precedents are in line with the text and purpose of Section 1988. Petitioner's proposed rule is not.

II. THE CIRCUITS APPLY THE *FARRAR* STANDARD TO ASSESS DISTRICT COURT AWARDS OF ATTORNEY'S FEES UNIFORMLY AND CONSISTENTLY.

In addition to their invocation of the holding in *Farrar*, petitioners assert that the circuits are split on four issues: the exceptionality of fee awards in nominal verdict cases; the meaning or application of the second and third *Farrar* factors—the "significance of the legal issue" and whether the litigation served a "public goal"; and the application of *Farrar* to police excessive-force cases. Pet. 18-26. In fact, all four of these supposed conflicts are illusory.

What petitioners present as inconsistencies among the circuit courts are simply differences in language or terminology and the circuits' application of the three *Farrar* factors to nominal damages cases involving vastly different facts and circumstances. When deciding whether to award attorney's fees to plaintiffs in nominal verdict cases, the courts of appeals *all* consistently consider the three *Farrar* fac-

tors articulated by Justice O'Connor: "(1) the difference between the judgment recovered and the recovery sought, (2) the significance of the legal issue on which the plaintiff prevailed and finally, (3) the public purpose served by the litigation." *Maul* v. *Constan*, 23 F.3d 143, 145 (7th Cir. 1994) (citation omitted).[6] The decisions petitioners cite for the alleged splits either are inapposite or illustrate the circuits' faithful application of the *Farrar* factors to cases with vastly different underlying facts, the discretion-intensive task of balancing the *Farrar* factors when they do not all point in the same direction, and the highly deferential abuse-of-discretion standard for reviewing district court attorney's fee awards.

The proof of the pudding here is petitioners' failure to show that identical cases have come out differently in different circuits. And petitioners have not identified *any* case with a fact pattern similar to that in this case—that is, a wrongful death case—in which attorney's fees were not awarded. Thus, petitioners have not demonstrated that respondent's counsel would have been denied attorney's fees had

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[6] See, *e.g.*, *Diaz-Rivera* v. *Rivera-Rodriguez*, 377 F.3d 119, 125 (1st Cir. 2004); *Cabrera* v. *Jakabovitz*, 24 F.3d 372, 393 (2d Cir. 1994); *Jama* v. *Esmor Correctional Servs., Inc.*, 577 F.3d 169, 175-176 (3d Cir. 2009); *Mercer* v. *Duke Univ.*, 401 F.3d 199, 204 (4th Cir. 2005); *Hidden Oaks Ltd.* v. *City of Austin*, 138 F.3d 1036, 1052-1053 (5th Cir. 1998); *Pouillon* v. *Little*, 326 F.3d 713, 716-717 (6th Cir. 2003); *Maul*, 23 F.3d at 145 (7th Cir.); *Muhammad* v. *Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997); *Mahach-Watkins*, Pet. App. 11 (9th Cir.); *Koopman* v. *Water Dist. No. 1 of Johnson County*, 41 F.3d 1417, 1420-1421 (10th Cir. 1994); *Gray* ex rel. *Alexander* v. *Bostic*, 613 F.3d 1035, 1040-1042 (11th Cir. 2010); *David* v. *District of Columbia*, 674 F. Supp. 2d 34, 37 (D.D.C. 2009), appeal dismissed, 2010 WL 288342 (D.C. Cir. Jan. 11, 2010).

this case been litigated in a different court of appeals. Certiorari accordingly should be denied: There is no confusion in or conflict among the circuits about the meaning or application of *Farrar* that warrants this Court's attention.

A. There Is No Circuit Split Over The Exceptionality Of Fee Awards In Nominal Damages Cases.

Petitioners begin by asserting that there is a split between the First Circuit and the Second and Eleventh Circuits over the exceptionality of fee awards to nominal damages plaintiffs. Petitioners argue that the First Circuit follows a rule making fee awards in nominal verdict cases nearly automatic, while the Second and Eleventh Circuits have held that such awards should be "rare" or "exceptional." Pet. 18-19. To support their claim regarding the First Circuit, petitioners cite language from *Diaz-Rivera*: "[A]lthough this fee-shifting provision [42 U.S.C. § 1988] is couched in permissive terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory." Pet. 18 (quoting *Diaz-Rivera*, 377 F.3d at 124).

The First Circuit, however, made this comment during a general discussion of Section 1988, before it turned more specifically to the *Farrar* opinion and whether a plaintiff who receives nominal damages is entitled to attorney's fees. When it made *that* inquiry, the First Circuit considered the same three *Farrar* factors that the Second and Eleventh Circuits, as well as all other courts of appeals, consider when determining whether nominal damages plaintiffs should receive attorney's fees. See, *e.g.*, *Gray*, 613 F.3d at 1040-1042 (11th Cir.); *Diaz-Rivera*, 377 F.3d at 125 (1st Cir.); *Pino* v. *Locascio*, 101 F.3d 235,

238-239 (2d Cir. 1996). Moreover, the Ninth Circuit never suggested that awards to prevailing parties who win nominal damages are obligatory, which would make the First Circuit's (asserted) suggestion to that effect beside the point here.

B. There Is No Circuit Split Over The Meaning Or Application Of The Second *Farrar* Factor—The "Significance Of The Legal Issue."

Petitioners get no further with their claim that the circuits are split over (i) the meaning of the second *Farrar* factor—the "significance of the legal issue on which the plaintiff claims to have prevailed"—and (ii) when an issue should be deemed "legally significant." Pet. 19-21, 24-26. In fact, the circuits are split in neither way.

1. Meaning Of "Significance Of The Legal Issue."

The courts of appeals almost uniformly agree that the second *Farrar* factor—"significance of the legal issue"—refers to the general legal importance of the plaintiff's successful Section 1983 claim.[7] The only even arguable departure from this consensus has occurred in the Tenth Circuit—not the Ninth—which has interpreted the second *Farrar* factor to re-

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[7] See, *e.g.*, *Diaz-Rivera*, 377 F.3d at 125 (1st Cir.) (interpreting the second *Farrar* factor to require an inquiry into the general legal importance of the issue); *Cabrera*, 24 F.3d at 393 (2d Cir.) (same); *Jama*, 577 F.3d at 175-176 (3d Cir.) (same); *Mercer*, 401 F.3d at 206 (4th Cir.) (same); *Maul*, 23 F.3d at 145 (7th Cir.) (same); *Milton* v. *City of Des Moines*, 47 F.3d 944, 946 (8th Cir. 1995) (same); *Mahach-Watkins*, Pet. App. 15-16 (9th Cir.) (same); *Gray*, 613 F.3d at 1040-1041 (11th Cir.) (same); *David*, 674 F. Supp. 2d at 37 (D.D.C.) (same).

quire not only that the issue on which the plaintiff succeeded be significant, but also that the plaintiff actually and meaningfully prevailed on that issue, within the context of the entire litigation. See, *e.g.*, *Barber* v. *T. D. Williamson, Inc.*, 254 F.3d 1223, 1231 (10th Cir. 2001).[8] It is not at all clear that this difference in the articulation of the standard is meaningful. And if the distinction is thought to warrant the Court's attention, that should await a case from the Tenth Circuit.

Moreover, even if the second *Farrar* factor ought to involve an inquiry into the overall success of the litigation, as suggested by the Tenth Circuit, it is doubtful that "the outcome might well have been different" in this case. Pet. 15. "The core of [respondent's] suit has always been her contention that Depee acted improperly in killing her son. The jury agreed with her, holding under § 1983 that Depee used unconstitutionally excessive force." Pet. App. 19. Respondent thus prevailed on her central claim. In such circumstances, there is no reason to believe that the Tenth Circuit would have disagreed with the court below that respondent achieved meaningful success, given that "the constitutional rights at stake in a wrongful death case are of a different magnitude than those at issue in non-death cases." Pet. App. 12.

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[8] Contrary to petitioners' suggestion, see Pet. 15, the Seventh Circuit does not adhere to the Tenth Circuit's articulation of the second *Farrar* factor. The Seventh Circuit's understanding of the "legal significance" factor is fully consistent with that of the other circuits. See, *e.g.*, *Maul*, 23 F.3d at 145 (7th Cir.) ("Thus we understand the second *Farrar* factor to address the legal import of the constitutional claim on which plaintiff prevailed.").

2. Application Of "Significance Of The Legal Issue."

The circuits' understandings of what counts as a legally significant issue are also consistent. Petitioners assert that some circuits take a non-"restrictive" (Pet. 20) view of what counts as legally significant, and that those circuits' "decisions are in tension with other circuit decisions where the courts have judged the legal issue on which the plaintiff prevailed to be insufficiently significant to justify a fee award." Pet. 19. On examination, however, differences in outcome are attributable to differences in the legal issues at stake.

For example, the court below deemed the issue of "the legality of state-sanctioned force resulting in death" to be significant. Pet. App. 16. In contrast, in *Boston's Children First* v. *City of Boston*, 395 F.3d 10 (1st Cir. 2005), the First Circuit held that the nominal damages award there did "not represent a victory on a significant legal issue" because the lower court never found that the school assignment plan challenged in the case was *unconstitutional*. 395 F.3d at 16-18.[9] These two holdings are completely consistent with one another. In one case, the Ninth Circuit found an issue legally significant; in the other, the First Circuit found a *different* issue not legally significant.

Moreover, some of petitioners' circuit characterizations are curious. For example, petitioners place

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[9] Instead, the district court had "awarded nominal damages on the basis of the defendants' *concession*, which acknowledged the dispositive effect of race in the school assignments * * *, but which rejected any conclusion that the [assignment plan] was unconstitutional." 395 F.3d at 17 (emphasis added).

the Seventh Circuit in the "restrictive" interpretation camp based on *Maul*. Pet. 20. But in *Maul*, the Seventh Circuit determined that "the issue on which the plaintiff there prevailed * * * *was* 'clearly a significant constitutional question.'" Pet. 20 (emphasis added) (quoting *Maul*, 23 F.3d at 145-146).[10] It is unclear how this supports petitioners' characterization of the decision.[11]

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[10] As a faithful adherent to the *Farrar* three-factor test, the *Maul* court went on to consider the other two *Farrar* factors and to take into account that the second factor "is the least important of the three factors," before ultimately concluding that the award of attorney's fees was an abuse of discretion. 23 F.3d at 145-147.

[11] Petitioners also cite decisions from the First, Second, Sixth, and Eleventh Circuits as examples of "restrictive" interpretations of what counts as legally significant. Pet. 19-20. These cases are equally unenlightening.

The First Circuit's determination in *Boston's Children First* that the issue in that case was not legally significant turned on the important fact that the district court *never found defendants' school assignment plan to be unconstitutional*. 395 F.3d at 17-18. Affirmance of the denial of attorney's fees in a case that did not involve a clear violation of the Constitution hardly seems like a "restrictive" interpretation of the legal significance requirement.

The quotation petitioners draw from *Pino* comes from the portion of the Second Circuit's opinion discussing the *third Farrar* factor, as applied in *Cabrera*, 24 F.3d at 393, not the "legal significance" factor. *Pino*, 101 F.3d at 239. *Pino* therefore does not bear on how "restrictively" or "broadly" the Second Circuit interprets the second *Farrar* factor.

In *Pouillon*, the Sixth Circuit did not discuss the significance of the legal issue involved at all: The plaintiff there so minimally succeeded on his claim that the Sixth Circuit found the first *Farrar* factor determinative. 326 F.3d at 717-718.

Petitioners' assignment of other circuits to the non-"restrictive" interpretation camp is equally mysterious. Every decision petitioners cite on this side of the alleged split is a run-of-the-mill abuse-of-discretion case in which the district court awarded attorney's fees and the court of appeals confirmed that the lower court had proceeded through a proper *Farrar* analysis before affirming the fee award.[12] The arbitrary nature of petitioners' characterizations is confirmed by their assignment of the First Circuit to *both sides* of the alleged split (see Pet. 19-20)—which suggests that the courts of appeals are not applying different tests at all, but instead are making fact-specific and nuanced determinations.

C. There Is No Circuit Split On The Application Of The Third *Farrar* Factor—Whether The Litigation Served A "Public Goal."

Petitioners also assert a circuit split over the application of the third *Farrar* factor—whether the litigation served a "public goal"—painting some circuits as adopting a broader reading of the public-goal fac-

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Finally, petitioners cite the Eleventh Circuit's holding in *Gray* ex rel. *Alexander* v. *Bostic*, 570 F.3d 1321 (11th Cir. 2009). This opinion has been rescinded and replaced. See *Gray*, 613 F.3d 1035. The holding in *Gray* "is limited to what counts and what does not when citation-counting is used as a method for assessing the significance of a decision in the plaintiff's favor." *Id.* at 1042. *Gray* is virtually silent on whether the Eleventh Circuit is generally a "restrictive" or "liberal" interpreter of the legal-significance standard.

[12] See, *e.g.*, *Diaz-Rivera*, 377 F.3d at 125 (1st Cir.) (holding that the district court did not abuse its discretion in awarding attorney's fees); *Mercer*, 401 F.3d at 212 (4th Cir.) (same); *Piper* v. *Oliver*, 69 F.3d 875, 877 (8th Cir. 1995) (same); *Jones* v. *Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994) (same).

tor than others. See Pet. 21-22. But once again, the decisions that petitioners cite simply display differences in phraseology and the circuits' application of public-goal factor analysis to vastly different fact patterns. Certain of these decisions state that the plaintiff must establish something more than the bare fact of a constitutional violation to satisfy the public-goal factor;[13] others hold that the plaintiff *did* establish more.[14] These decisions do not present con-

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[13] See *Pino*, 101 F.3d at 239 ("Although we recognize that litigation can accomplish much besides awarding money damages, not every tangential ramification of civil rights litigation *ipso facto* confers a benefit on society. * * * The litigation [must] accomplish[] more than giving the plaintiffs 'the moral satisfaction of knowing that a federal court concluded that their rights had been violated.'") (citation omitted); *Maul*, 23 F.3d at 146 ("The public purpose prong of *Farrar* is * * * not satisfied simply because plaintiff successfully establishes that his constitutional rights have been violated. Something more is needed.").

[14] See *O'Connor* v. *Huard*, 117 F.3d 12, 18 (1st Cir. 1997) ("[T]he district court's order [granting attorney's fees] recognized the importance of providing an incentive to attorneys to represent litigants * * * who seek to vindicate constitutional rights but whose claim may not result in substantial monetary compensation * * * [and in] prevent[ing] 'future abuses of the rights of pretrial detainees.'") (citation omitted); *Muhammad*, 104 F.3d at 1070 ([T]he jury's verdict * * * accomplished a public goal, namely, encouraging governments scrupulously to perform their constitutional duties."); *Piper*, 69 F.3d at 877 ("The district court * * * determined that * * * a public goal had been served by [plaintiff's] victory in encouraging [defendants] to refashion their forfeiture procedures to avoid future illegality. * * * Finding no abuse of discretion in the district court's decision, we affirm."); *Koopman*, 41 F.3d at 1421 ("As a result of this case, [defendant] is on notice that it must provide its employees with constitutionally adequate pretermination and post-termination hearings."). The Ninth Circuit's decision in *Guy* v. *City of San Diego*, 608 F.3d 582 (9th Cir. 2010), cited at Pet. 23 n.6, 26, presents a different issue than the present

tradictory rules or indicate that any circuit would have decided the present case differently than did the court below. In particular, petitioners do not cite a single decision with facts similar to those in the present case—that is, involving excessive force resulting in death—in which no public goal was found. So here, too, the allegation of a conflict is wholly chimerical.

D. The Abuse Of Discretion Standard Of Review On Appeal Explains The "Inconsistent" Results Alleged By Petitioners.

At the end of the petition, petitioners discuss two cases that involved the use by police of excessive force in violation of the plaintiff's Fourth Amendment rights, that resulted in an award of nominal damages, and in which "each plaintiff's vindication was acknowledged * * * to be significant and important to the public." Pet. 25-26; see *Milton*, 47 F.3d 944 (8th Cir.); *Briggs* v. *Marshall*, 93 F.3d 355 (7th Cir. 1996). Petitioners maintain that the appellate courts' affirmance of the district courts' denial of attorney's fees in these cases shows that "the circuits inconsistently apply *Farrar* to nominal verdicts and fee awards in police excessive force cases like the present one." Pet. 24.

As a factual matter, however, there is an obvious and significant distinction between *Milton* and *Briggs*, on one hand, and this case on the other: In *Milton* and *Briggs* excessive force resulted in injury; here, it resulted in death. Thus, petitioners' claim

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case—namely, whether the fee award itself may be taken into account in the *Farrar* public-goal analysis. If the Court is concerned about that question, it should wait for a case in which it is presented.

that "[n]o principled distinctions can be drawn to explain the different outcomes" (Pet. 25) is false.

That respondent's son was killed is a relevant distinction not only because it adds to the significance of the legal issue on which respondent prevailed. It is also material because where, as here, death is swift and pain, suffering, and medical treatment are not at issue before the jury, there is (according to the district court below) nothing for which monetary damages can compensate.[15] In contrast, in cases like *Milton* and *Briggs*, damages *can* compensate for the pain, suffering, and cost associated with recovering from injury. Therefore, the award of only nominal damages here does not reflect respondent's failure to succeed on her Section 1983 claim the way that it did for the plaintiffs in *Milton* and *Briggs*.

In any event, even if there *were* "[n]o principled distinctions" among the three cases, their different outcomes would reflect nothing more than the abuse-of-discretion standard at work—*not*, as petitioners claim, a circuit split over the meaning of the *Farrar* factors. In the decision below, the court of appeals reviewed the district court's decision *to award* attorney's fees under an abuse-of-discretion standard. In *Milton* and *Briggs*, the Seventh and Eighth Circuits applied that standard in reviewing the district

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[15] Of course, with her son's death, respondent lost his companionship and any potential future income stream. But that loss was unrelated to the Section 1983 claim, which was the *estate's* claim. The only compensatory damages that would have been available on the Section 1983 claim—if the judge had not ruled as a matter of law that such damages were unavailable—were damages to compensate for *Watkins'* pain, suffering, medical costs, and loss of enjoyment of life.

courts' decisions *not to award* attorney's fees. All three courts of appeals affirmed the lower courts' decisions because none of the lower courts abused its discretion.

Under this standard, the relevant question is *not* whether the reviewing court would have reached the same result as the trial court were the question one of first impression. See *Nat'l Hockey League* v. *Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). On "the same set of facts, different results could be acceptable" under "appellate review * * * for 'abuse of discretion'" (*Belot* v. *Burge*, 490 F.3d 201, 206 (2d Cir. 2007)), so long as neither choice "constitute[d] a clear error of judgment." *United States* v. *Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (quotation marks and citation omitted). See also *Ledford* v. *Peeples*, 605 F.3d 871, 922 (11th Cir. 2010) ("The relevant inquiry * * * is whether the district court's decision was tenable, or, we might say, 'in the ballpark' of permissible outcomes."). As the Court of Appeals for the D.C. Circuit recently stated:

> There is no inconsistency between our ruling in this case and our ruling in [another case]. In the latter, we held that it was permissible for the district court to [rule as it did]; we did not suggest that it would have been error for the court to [rule as the district court here did]. Here, too, it would have been permissible for the district court to [rule as the trial court in the earlier case did]. We hold only that the court did not abuse its discretion by barring the impeachment. *The different outcomes reflect nothing more than the nature of an "abuse of discretion" standard of review.* Where, as here, two different * * * rulings

> would be reasonable, the standard leaves the choice to the discretion of the trial judge.

United States v. *Fonseca*, 435 F.3d 369, 377 (D.C. Cir. 2006) (emphasis added).

Specifically with respect to appeals involving 42 U.S.C. § 1988, "a reviewing court customarily defers to the trial judge, whose intimate knowledge of the nuances of the underlying case uniquely positions him to construct a condign award." *Gay Officers Action League* v. *Puerto Rico*, 247 F.3d 288, 292 (1st Cir. 2001) (citing *Coutin* v. *Young & Rubicam, Inc.*, 124 F.3d 331, 336 (1st Cir. 1997), and *Lipsett* v. *Blanco*, 975 F.2d 934, 937 (1st Cir. 1992)). Such appropriate deference by the courts of appeals, and "principled distinctions" (Pet. 25) among the cases—not disagreement over the *Farrar* factors—explain the attorney's fee awards in the cases cited by petitioners.

III. THIS CASE IS A POOR VEHICLE WITH WHICH TO CONSIDER THE QUESTION PRESENTED.

Even if petitioners were correct regarding the circuit split they allege, this case would not present a suitable vehicle with which to resolve the issue because it is atypical of attorney's fees litigation in several material respects. First, the parties dispute whether respondent requested a specified amount in damages, which confuses the analysis of the first *Farrar* factor. Compare Pet. 7, 13, with Pet. App. 12. And if the decision below really does rest on the court of appeals' having "overlooked the facts that the plaintiff attached to her complaint a government claim seeking $10 million in damages, and incorporated that claim in her complaint" (Pet. 7; but see

note 2, *supra*), correcting that factual error is hardly the role of this Court. Second, respondent's nominal damages award was brought about by a novel interpretation of state law, a scenario quite distinct from the more usual situation in which the plaintiff failed to prove an element of his or her case.

Finally, this Section 1983 suit involves a claim of excessive force resulting in death, which elevates the importance of respondent's claim. It also means that respondent lacks Article III standing to seek injunctive relief, which would make her ineligible even to seek a fee award under petitioners' proposed standard. If the Court is inclined to address the issue presented here, it would be appropriate to do so in a case that lacks these features.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[16] The Court has denied certiorari in several cases raising similar issues. See *Barrington* v. *Ermine*, 534 U.S. 994 (2001); *Kansas* v. *Brandau*, 526 U.S. 1133 (1999); *Yourdon, Inc.* v. *Bridges*, 520 U.S. 1274 (1997); *Water Dist. No. 1 of Johnson County* v. *Koopman*, 516 U.S. 965 (1995); *Romberg* v. *Nichols*, 516 U.S. 943 (1995); *Milton* v. *Heller*, 516 U.S. 824 (1995); *Peters* v. *Polk County Mem'l Hosp.*, 513 U.S. 807 (1994). If the question presented here arises as frequently as petitioners suggest, a more appropriate vehicle is likely to arise sooner rather than later.

Respectfully submitted.

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NOVEMBER 2010

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

SYLVIA MAHACH-WATKINS, Individually and as the Successor in Interest to the Estate of JOHN JOSEPH WAYNE WATKINS	)	
Plaintiffs,	)	NO. C 05-01143-SI
vs.	)	
LARRY DEPEE, STATE OF CALIFORNIA, and DOES 1 through 100, Inclusive	)	San Francisco, California Thursday August 9, 2007 8:30 a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

[Excerpt: page 210, line 15: page 216, line 11]

[MS. BEATIFICATO, Counsel for Plaintiff:] Before I go on—before I get to that, I want to help you with the verdict form, because what you have to assess, first of all, is the damages that have come to Mrs. Mahach-Watkins for the loss of her son. And the jury instructions tell you that that is the compensatory damages or general damages for Mrs. Mahach-Watkins. And you'll have a verdict form. And it

will start out under Claim 1. And now it's up on the screen for you.

And as to Claim 1, it will ask you about the violation of John Watkins' Fourth Amendment rights, his right, which you've already determined was violated, his right to be free from excessive and unreasonable force.

Now there are only two options under Claim 1 that you can award. And the first is nominal damage. You must pick an amount between zero and 1 dollar—it's something which the law considers nominal damages. There is a jury instruction on it to basically say that you've already found there's a violation, and now you've put that amount in.

And then the next thing is punitive damages. And we're going to get into what the standard is for punitive damages, because you have a jury instruction on that. And you will assess the amount that you feel reasonably compensates Mrs. Watkins under the general damages for the third claim, and then the also how much to award in punitive damages.

Let's turn to Claim 3 or for a second. Everything I've spoken about—the society, the loss of the society, the companionship, the care, and the comfort—that all relates to Claim 3. Those kind of damages—they're not applicable under Claim 1. So when you talk and you assess about what the value of John Watkins'—the loss to Mrs. Mahach-Watkins from John Watkins' death, that's all related to Claim 3 under her wrongful-death claim.

And so the choices that you have under there are no damages, which—essentially you would be determining that Mrs. Mahach-Watkins has suffered no loss because of her son's death, which would be com-

pletely contrary to all of the evidence that's been presented, and really just from a basic human-nature standpoint, would just be inconceivable. The second option for you is nominal damages, and then the third is damages.

The third line representing damages are these general compensatory damages that we are speaking about. The value that you determine is—compensates—fully compensates Mrs. Mahach-Watkins for the loss of her son, and specifically the good things that her son brought to her: the society, the comfort, the love, the companionship, the affection, the security, the protection, those sorts of things. You fill in that dollar amount there.

And then the second question that you have to answer with regard to Claim 3 is whether Officer Depee's conduct in shooting and killing John Watkins—that which you already determined was unreasonable and excessive and in violation of the Fourth Amendment—whether that conduct was malicious, oppressive, or in reckless disregard of John Watkins' rights.

And so at this time I want to go to the jury instruction on punitive damages. That jury instruction tells you—it defines for you what reckless disregard of the decedent's rights—what kind of conduct amounts to that, as well as what oppressive or malicious conduct is. And specifically, it states that conduct is malicious if it's accompanied by ill will or spite, or if it is for the purpose of injuring another.

Ladies and gentlemen, there is no doubt about it. When Officer Depee took out his weapon and he fired it at John Watkins, he intended on injuring another. No doubt about that. That's not in dispute. He in-

tended to injure John Watkins. It wasn't an accidental go-off of the gun, and John Wakins happened to be shot. He intended. That meets the definition of conduct that is malicious, but it goes even further than that.

You can find an award of punitive damages just based on conduct that's in reckless disregard of the decedent's rights. And it says that if, under the circumstances, it reflects a complete indifference to the decedent's safety or rights, or the defendant acts in the face of a perceived risk, that his actions will violate the decedent's safety or rights.

Officer Depee shot and killed John Watkins on the night of December 9th, 2003. And he knew what the result of that conduct was going to be. He panicked. He overreacted, and took the life of another human being.

Now, Officer Depee, during the first phase of this trial, tried to convince you that what he did was justified. You've already determined that the defense side was wrong. They weren't justified in shooting and killing John Watkins. And they're going to get up here and argue that there were—that you shouldn't award punitive damages.

Ladies and gentlemen, the jury instruction tells you that the purpose behind awarding punitive damages is to deter this type of conduct; to ensure that some other Sylvia Mahach-Watkins doesn't have to go through this kind of loss; that this kind of thing doesn't happen again.

You see, the only way that we, as a society, can really regulate police behavior and conduct is to send messages, to send messages that this kind of conduct should not happen, to not condone this kind of con-

duct. And unfortunately, the reason for punitive damages—and the purpose behind it is illustrated in the jury instruction—is for deterrence.

Send a message. Let the defendants know that this conduct will not be tolerated by our society. That's your job, as jurors.

Now I want to turn back to, for a second, the damages under Claim 3 before we move on to Claim 1, the general damages.

There is no set formula. I told you that. You're going to have to go back there. And, ladies and gentlemen, if you can, after you return your verdict, look at Mrs. Mahach-Watkins in the eyes and tell her that the number that you put in that verdict form under damages under Claim 3 the third line down—that the number that you put in there is the amount that will reasonably compensate Mrs. Mahach-Watkins for the loss of her—all of those good things that John Watkins brought to her life, we can live with that verdict. We accept that. Just—the number that you fill in on the third line needs to reasonably compensate Mrs. Mahach-Watkins for her loss.

And I'd only submit to you again that if a great masterpiece from an earthly master can be worth at least $10- or $20 million, then what is the value of a masterpiece—John, the masterpiece of Sylvia—from the greatest master of all?

Now, turning to Claim 1, punitive damages, I think at a minimum, the evidence that's before you supports that the number you need to fill in on Claim 1 under general damages is at least $10 million. And then under Claim 1, you need to fill in an amount for punitive damages.

I want to make one thing clear to you. Punitive damages and compensatory or general damages are completely two separate things, and they have two separate purposes. The first is a jury instruction tells you compensatory damages. General damages, the damages from Mrs. Mahach-Watkins under Claim 3 is for the loss of care, comfort, society, and companionship of John Watkins. Completely separate issue. You should decide that first.

Once you determine that amount, the second question you must ask yourself is: do we need to deter this sort of conduct? Is the conduct that Officer Depee engaged in by violating the Fourth Amendment rights of decedent John Watkins, as well as in engaging in conduct that made him liable under the wrongful-death claim—is that conduct which is oppressive, malicious, or done with reckless disregard?

And the answer is unequivocally yes, based on the jury instruction and the definitions that you're given.

So then your last step should be to go ahead and determine an amount of punitive damages that's going to be necessary to send a message to the State of California that this conduct will not be tolerated.